Supreme Court, U.S.
FILED

No. 021085

JAN 16 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

AMELIA SIBUG MACASPAC,

Petitioner,

v.

U.S. IMMIGRATION & NATURALIZATION SERVICE; JOHN ASHCROFT, Attorney General,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it violates the due process guarantee of the Fifth Amendment of the U.S. Constitution to deport an asylum applicant without a hearing on the merits, whose first lawyer: a] missed a filing deadline; b] filed a worthless motion to re-open; and c] did not keep the applicant apprised of the actions of the lawyer.

2. Whether it is an abuse of discretion to rule that an asylum applicant has failed to demonstrate prima facie eligibility for relief, where the applicant has been threatened with violence, where her cousin was killed, and where a communist group searched for her in her house; all on account of applicant's political opinion.

LIST OF PARENT COMPANIES

The petitioner is neither a corporation nor a subsidiary of a corporation.

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OPINIONS AND ORDERS BELOW

The October 29, 2002 opinion of the U.S. Court of Appeals for the Fourth Circuit, Pet. App. 1, is unreported. The May 31, 2002 opinion of the Board of Immigration Appeals is also unreported. Pet. App. 3. The February 12, 2001 opinion of the Immigration Judge is unreported. Pet. App. 5.

BASIS FOR JURISDICTION

The Board of Immigration Appeals dismissed the Petitioner's appeal of an earlier immigration judge's decision on May 31, 2002. Petitioner then filed a Petition for Review in the U.S. Court of Appeals for the Fourth Circuit. That court denied the petition on October 29, 2002.

This Court has jurisdiction to review the Fourth Circuit's decision pursuant to 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1158 provides that an alien may apply for asylum in the United States.

8 C.F.R. § 3.2(c)(2) provides that "... a party may file only one motion to reopen deportation or exclusion proceedings (whether before the Board or the Immigration Judge)..."

STATEMENT OF THE CASE

Ms. Macaspac, the Petitioner, from the Philippines, was threatened by a communist group on account of her political opinion. Her cousin was killed for the same

reason. Ms. Macaspac then hired a lawyer to present her case in court. That lawyer missed a deadline, resulting in her case being denied. Ms. Macaspac has still not had the opportunity to present her case to a court on the merits.

The Facts

Ms. Macaspac, a native and citizen of the Philippines, was a member of the New Society Movement, a political group that supported President Ferdinand Marcos. *See* Statement of Ms. Macaspac, dated 6/20/00, attached to her asylum application, in the Certified Administrative Record ["A.R."] at page 000,055. She prepared banners and streamers for rallies for Marcos.

The New Peoples Army ["NPA"] is an armed, pro-communist group which is openly hostile to Marcos, and to those who support him, such as members of the New Society Movement, including Ms. Macaspac. After one pro-Marco rally, Ms. Macaspac was "grabbed by the neck," by an anti-Marcos zealot. *Id.* In 1988, the NPA killed Mr. Sibug, the cousin of Ms. Macaspac "in his own house in the presence of his wife." A.R. 056. In February 1990, the NPA "came to our house looking for me." *Id.* Ms. Macaspac was not home at the time. This event is corroborated by a sworn affidavit executed on 2/26/00 by Ms. Lucia Macaspac, the mother of applicant. Therein, the mother states that the NPA is active, and

"7. That sometime on February 20, 1990, a band of New People's Army armed to the teeth came to our Barrio, conducted a massive raid and were looking for my daughter AMELIA S. MACASPAC whom the rebels suspected of having reported them to the authorities."

A.R. 053. The mother advised Ms. Macaspac to flee the country.

On March 5, 1994, Mr. Pineda, the Mayor of Lubao, wrote Ms. Macaspac a letter, stating, "it is not wise for you to come back to the Philippines at the risk of your young life for I do not want you to suffer the fate of your first cousin." A.R. 057.

The NPA Is Still Active

The NPA is still active. In 1999, the Ninth Circuit Court of Appeals granted asylum to a woman who was harassed and threatened by the NPA. *Borja v. INS*, 175 F.3d 732 (9th Cir. 1999).

A headline from a newspaper dated 7/6/00 reads, "NPA rebels kill 8 cops, 2 civilians." A.R. 197. On 6/29/00, another headline reads "Colonel, 12 soldiers killed in NPA ambush." A.R. 204. In another affidavit, applicant's mother writes in August 2000 that the NPA is "active," and that a "Barangay captain" was "recently" assassinated. A.R. 205.

On August 1, 2002, the Ninth Circuit ruled that another victim of the NPA was eligible for asylum: *Manimbao v. INS*, 298 F.3d 852 (9th Cir. 2002). Mr. Manimbao actively assisted in the late President Marcos's campaign against communist rebels, in 1983, which angered the NPA. As a result, the NPA killed farm animals belonging to Mr. Manimbao, and beat Mr. Manimbao. In 1992, Mr. Manimbao entered the United States and applied for asylum. The IJ and the BIA ruled against him; however, in August 2002, the Ninth Circuit ruled he was eligible.

Proceedings In The United States

In 1992, Ms. Macaspac filed an application for asylum, as per 8 U.S.C. section 1158(a). A Notice to Appear was issued on 7/5/00, and Ms. Macaspac hired Ms. Jaye Lowe, Esq., as her lawyer.

On 9/6/00, Ms. Macaspac and Ms. Lowe appeared before an Immigration Judge in Baltimore, MD, who ordered Ms. Macaspac to file an updated asylum application by 11/6/00. A.R. 042. Ms. Lowe promised to file materials by that date, and Ms. Macaspac relied on that promise to her detriment. Ms. Lowe, however, did not file materials by that deadline. Accordingly, the Immigration Judge ordered Ms. Macaspac removed from the country. A.R. 170. Ms. Lowe, without informing Ms. Macaspac, then filed a Motion to Reopen with the Immigration Judge, explaining that the deadline was missed because Ms. Lowe had a severe illness. This motion was denied, and Ms. Lowe filed an appeal with the Board of Immigration Appeals ["BIA"]. On May 31, 2002, the BIA denied the appeal. It was only after the decision of the BIA that Ms. Macaspac became aware of what Ms. Lowe had and had not done.

Ms. Macaspac did not file a second Motion to Reopen with the IJ or at the BIA because an applicant may file "only one" such motion. 8 C.F.R. section 3.2(c)(2).

On 7/18/02, Ms. Macaspac filed an informal brief with the Fourth Circuit Court of Appeals, stating that she had relied on the promise of Ms. Lowe to file materials by the deadline. Ms. Macaspac alleged that she had filed a complaint against Ms. Lowe with the Attorney Grievance Commission of Maryland, and that she had complied

with the requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988)

The Decisions Below

The Immigration Judge, without mentioning the U.S. Constitution, determined that the claim should be denied, because Ms. Macaspac had missed the 11/6/00 deadline, and because "the affidavit of the respondent's mother does not demonstrate" that Ms. Macaspac had a prima facie case for asylum.

The Board of Immigration Appeals affirmed, without opinion.

The U.S. Court of Appeals for the Fourth Circuit affirmed, stating that Ms. Macaspac had failed to exhaust her administrative remedies, and that it was not an abuse of discretion to find that Ms. Macaspac had failed to demonstrate prima facie eligibility for asylum.

REASONS FOR GRANTING THE WRIT

A. *The Court below failed to address whether it violates the due process guarantee of the Fifth Amendment of the U.S. Constitution to deport an asylum applicant without a hearing on the merits, whose first lawyer: a] missed a filing deadline; b] filed a worthless motion to re-open; and c] did not keep the applicant apprised of the actions of the lawyer.*

The Fourth Circuit Court of Appeals denied Ms. Macaspac's appeal, stating that she had "failed to exhaust administrative remedies" at the BIA, citing *Farrokhi v. INS*, 900 F.2d 697 (4th Cir. 1990). The Fourth Circuit did

not specify what "administrative remedies" might have existed, which were not exhausted.

In fact, there were no real remedies at the BIA. Ms. Macaspac's first lawyer had already filed one Motion to Re-open; it was denied. Ms. Macaspac is barred from filing a second motion to re-open by 8 C.F.R. section 3.2(c)(2), which provides that "... a party may file only one motion to reopen deportation or exclusion proceedings (whether before the Board or the Immigration Judge)..."

The case of *Farrokhi v. INS,* 900 F.2d 697 (4th Cir. 1990) is not relevant. In that case, the applicant, who was *pro se,* was given ten days to file his asylum application. For reasons not explained, applicant filed his asylum application tardily, about six months later. Applicant did not file a Motion to Re-open. Applicant then hired counsel, who prosecuted an appeal to the BIA. That Tribunal also ruled against applicant, as did the Fourth Circuit. 8 C.F.R. section 3.2 was not invoked; applicant did not even file one motion to re-open. Additionally, applicant, being *pro se* in the Immigration Court, did not rely to his detriment on a lawyer.

In the case at bar, Ms. Macaspac did exhaust all of her administrative remedies. The only remedy which might be available to her is a second Motion to re-open, which is barred by section 3.2 of the C.F.R.

Section 3.2 of the C.F.R. should be construed to avoid constitutional problems, as was the statute in *Zadvydas v. Davis,* 121 S. Ct. 2491, 533 U.S. 678 (2001).

In *Zadvydas*, petitioner was born in Germany, and committed several crimes in the United States. After being convicted of attempted robbery, burglary, theft, and possessing cocaine, he was sentenced to 16 years' imprisonment. He was ordered deported to Germany, but that country would not accept him. The Attorney General then proposed to detain petitioner indefinitely, pursuant to 8 U.S.C. section 1231(a)(6).

The Supreme Court, however, noted that a statute "permitting indefinite detention of an alien would raise a serious constitutional question," perhaps violating the Fifth Amendment's Due Process Clause. *Id.* At 2498. That Clause forbids the Government to "deprive" any "person... of liberty...without due process of law." The court found that there was "no sufficiently special justification here for indefinite civil detention" articulated by the Government. *Id.* At 2499. The court noted that the Due Process Clause applies to all "persons" within the United States, "including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Id.* At 2500.

Furthermore, aliens "may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." *Id.* At 2501. The court then ruled that the statute in question must be construed to contain an implicit "reasonable time" limitation, to avoid constitutional concerns.

The reasoning of *Zadvydas* should be applied to the case at bar: a regulation which has the effect of having a person deported, due to the mis-deeds of her lawyer, must be construed to avoid serious constitutional concerns.

It violates the due process rights of an asylum applicant to deny her the right to her day in court, because she "did not exhaust her administrative remedies," when she had no such remedies. Ms. Macaspac was represented by Ms. Lowe, Esq., at the Immigration Court and also at the BIA. Ms. Macaspac did not learn of the failures and acts of Ms. Lowe until it was too late.

The "constitutional sufficiency of procedures provided in any situation, of course, varies with the circumstances.... [Courts must determine] whether the procedures meet the essential standards of fairness under the Due Process clause..." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) Ms. Macaspac has been injured by her first lawyer, and is now being injured by unfair procedural rules. She has been treated unfairly, in violation of the Due Process Clause.

B. *The Court below failed to properly consider the evidence of record which demonstrates that applicant has a prima facie case for a grant of asylum, where the applicant was threatened with violence, where her cousin was killed, and where a communist group searched for her in her house; all on account of applicant's political opinion.*

The Immigration Judge stated in his Order that "the affidavit of respondent's mother" was insufficient. The Immigration Judge did not mention any of the following evidence of record:

Ms. Macaspac, a native and citizen of the Philippines, was a member of the New Society Movement, a political group that supported President Ferdinand Marcos. *See* Statement of Ms. Macaspac, dated 6/20/00, attached to her asylum application, in the

Certified Administrative Record ["A.R."] at page 000,055. She prepared banners and streamers for rallies for Marcos.

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"7. That sometime on February 20, 1990, a band of New People's Army armed to the teeth came to our Barrio, conducted a massive raid and were looking for my daughter AMELIA S. MACASPAC whom the rebels suspected of having reported them to the authorities." A.R. 053. The mother advised Ms. Macaspac to flee her country.

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The Refugee Act Should Be Construed In Favor Of Granting Benefits To A Refugee

It is appropriate to reference the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. St. Cyr*, 121 S.Ct. 2271, 2291 (2001).

The Refugee Act was enacted in "response to the urgent needs of those subject to persecution in their homelands." *Marincas v. INS*, 92 F.3d 195, 198 (3rd Cir. 1996).

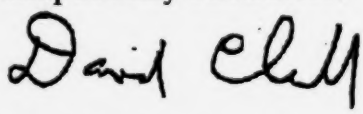
"Physical harm is not required to establish persecution." *Desir v. Ilchert*, 840 F.2d 723, 727 (9th Cir. 1988) Threats alone can be sufficient to establish persecution. *Sotelo-Aquije v. Slattery*, 17 F.3d 33, 37 (2d. Cir. 1994)

In the case at bar, Ms. Macaspac has suffered physical harm, and she has been threatened. She deserves to have her day in court, to establish her claim of persecution.

CONCLUSION

Ms. Macaspac has not yet had her day in court. She deserves to have her case re-opened, so that she may present her case on the merits.

Respectfully submitted,



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UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

AMELIA SIBUG MACASPAC,
Petitioner,

v.

No. 02-1699

U.S. IMMIGRATION & NATURALIZATION SERVICE; JOHN ASHCROFT, Attorney General,
Respondents.

On Petition for Review of an Order of the Board of Immigration Appeals.
(A72-513-082)

Submitted: October 15, 2002
Decided: October 29, 2002
[Entered: October 29, 2002]

Before MICHAEL and KING, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

Amelia Sibug Macaspac, Petitioner Pro Se. George W. Maugans, IMMIGRATION AND NATURALIZATION SERVICE, Baltimore, Maryland; Allen Warren Hausman, Assistant Director, Emily Anne Radford, Blair Timothy O'Connor, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondents.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Amelia Sibug Macaspac, a native and citizen of the Philippines, petitions for review of an order of the Board of Immigration Appeals (Board) affirming the Immigration Judge's decision to deny her motion to reopen removal proceedings. Macaspac first contends that counsel was ineffective in failing to file an updated asylum application on her behalf by the deadline established by the Immigration Court. Because Macaspac failed to exhaust administrative remedies by raising this claim before the Board, we find that we are without jurisdiction to consider it in the context of this appeal. *See Stewart v. INS*, 181 F.3d 587, 596 (4th Cir. 1999); *Bernal-Vallejo v. INS*, 195 F.3d 56,64 (lst Cir. 1999); *Farrokhi v. INS*, 900 F.2d 697, 700 (4th Cir. 1990).

> Macaspac next asserts that the Board, in affirming the IJ, abused its discretion in declining to grant the motion to reopen due to Macaspac's failure to demonstrate prima facie eligibility for asylum. We have reviewed the administrative record and conclude that this finding does not amount to an abuse of discretion. *M.A. v. INS*, 899 F.2d 304, 308 (4th Cir. 1990) (en banc); *see* 8 C.F.R. § 3.2(a) (2002).

We accordingly affirm the Board's order. We dispense with oral argument because the facts and legal contentions are adequately I presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

U.S. Department of Justice
Decision of the Board of Appeals
Executive Office of Immigration Review
Falls Church, Virginia 22041
File: A72-513-082 - Baltimore

In Re: MACASPAC, AMELIA SIBUG

IN REMOVAL PROCEEDINGS APPEAL

ON BEHALF OF RESPONDENTS:
Jaye A. Lowe, Esquire

ON BEHALF OF SERVICE:
Dominguez, Linda A.

Entered: May 31, 2002

ORDER:

PER CURIAM. The Board affirms, without opinion the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(a)(7).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's Order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* 240B(d) of the Act.

_____

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION
JUDGE GEORGE FALLON FEDERAL BUILDING
31 HOPKINS PLAZA- ROOM 440
BALTIMORE, MARYLAND

IN THE MATTER OF Amelia Sibug Macaspac

IN REMOVAL PROCEEDINGS A 72 513 082

ON BEHALF OF RESPONDENT
Jaye A. Lowe, Esq:
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Hyattsville, MD 20783

ON BEHALF OF INS
George Maugans, Esq.
INS District Counsel,
31 Hopkins Place -7th Floor,
Baltimore, MD 21201

Filed February 12, 2001

DECISION AND ORDER

The respondent with counsel at a removal hearing at Baltimore, Maryland on September 6, 2000 conceded removability and asked to be considered for the relief of asylum. Counsel for respondent was informed that a previous application filed in 1992 was outdated and that the application must be filed by November 6, 2000 for the Court to. consider the relief. The Court on November 22, 2000 issued a decision of abandonment and voluntary departure with the application not being filed.

The respondent on February 7,2001 filed a Motion to Reopen. The motion will be reopened in part for the Court to vacate the decision for voluntary departure and reinstate same at this time. The Court will not disturb the decision involving the abandonment of the relief of asylum.

The Court finds unpersuasive the claim that the asylum application was sent by mail and not received. It is unlikely that neither the Court nor the Immigration Service would not receive the application. Also, the application with the motion does not demonstrate prima facie eligibility for asylum. The affidavit of the respondent's mother does not demonstrate that the respondent would be persecuted under any of the grounds Under the Act.

The respondent is granted voluntary departure until April 13, 2001 with an alternate order of removal to the Philippines.

IT IS SO ORDERED.

February 12, 2001 /s/Bruce Michael Barrett
Date Bruce Michael Barrett
U.S. Immigration Court
Baltimore, Maryland